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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

OMAR RODRIGUEZ, ***Petitioner***

v.

STATE OF GEORGIA, ***Respondent***

On Petition For Writ Of Certiorari
To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Lawrence Eric Taylor
Counsel of Record
3780 Kilroy Airport Way, Suite 310
Long Beach, CA 90806
(562) 989-4774

Norman H. Cuadra
Attorney for Petitioner
Norman H. Cuadra, P.C.
496 Medlock Road
Decatur, Georgia 30030
(404) 373-6315

William C. Head
Attorney for Petitioner
750 Hammond Drive, Building 5
Atlanta, Georgia 30328
(404) 250-1113

43 pp

QUESTION PRESENTED

Whether, under the due process and equal protection clauses of the United States Constitution, where a police government agency has paid for and instituted a county-wide program for making available telephone-based foreign language translation services for police officers to use in the investigation and handling of criminal cases, a legal obligation to use or attempt to use such services is implied by law when important legal rights are being communicated by police to a non-English speaking person in detention.

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IN THE

SUPREME COURT OF THE UNITED STATES

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OMAR RODRIGUEZ, ***Petitioner***

v.

STATE OF GEORGIA, ***Respondent***

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App. A, *infra*, 1a-9a) is reported at 275 Ga. 283, 565 S.E.2d 458 (2002). The order of the State Court of Dekalb County is unreported.

JURISDICTION

The Supreme Court of Georgia entered its judgment on June 24, 2002, (App., *infra*, 1a-9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply and notification served on the Attorney General of the State of Georgia pursuant to Rule 29.4(c) has been made.

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STATEMENT OF THE CASE

Petitioner is of Hispanic descent and is a non-English speaking United States citizen. On December 2, 2000, Petitioner was stopped and detained by a Dekalb County Georgia patrol officer. When the officer approached the vehicle, he detected a strong odor of alcohol, observed glassy, bloodshot eyes and determined that the Petitioner could not communicate in the officer's spoken language. The officer then requested Petitioner to produce his license and insurance. The Petitioner did not comply due to a language barrier. The officer, using hand signals, was then able to get the Petitioner outside of the vehicle and comply with an Alco-sensor evaluation. The officer had to obtain a manual reading as he could not get the Petitioner to understand that he needed to blow into the device for four to five seconds. No other field sobriety evaluations were used due to the language impairment.

The officer then arrested the Petitioner and read the implied consent notice in English and requested a State administered chemical test of the Petitioner's breath. The officer did not get a verbal response, but the Petitioner shook his head up and down in an affirmative manner. At the time, the officer determined that the Petitioner could not have made a knowing, voluntary or intelligent choice on whether or not to take the state's chemical test, refuse the test or request additional testing due to the Petitioner's language barrier. However, the officer understood --- due to existing Georgia case law --- that he was not required to read the implied consent notice in any language other than English, with the exception that a hearing-impaired person had the right to a qualified interpreter.

The officer also knew that he had at his disposal, a telephone-based translation service from "Language Line". This county-paid service was in place to provide translations in over 100 languages. The officer knew that he could have

accessed Language Line in order to translate the implied consent advisements to the Petitioner. Under these advisements, if Petitioner could have understood what was being said, he could have either refused all testing or could have obtained an additional blood test at Dunwoody Medical Center or a urine test at the jail, if the Petitioner had been able to make the request.

The officer transported the Petitioner to the Dekalb County Jail where he attempted to administer a breath test to the Petitioner. The officer, due to the language barrier, could only get the Petitioner to blow into the Intoxilyzer for four or five seconds and received an insufficient sample. Despite blowing, the Petitioner was charged with having refused to take the state-administered chemical test. The evidence of Petitioner's alleged refusal to provide a proper sample of his breath was used as part of the State's proof of the crime of "DUI" in the Petitioner's trial.

A. Proceedings Below

On February 16, 2001, the Petitioner was charged with, *inter alia*, Driving Under the Influence of Alcohol. On April 5, 2001, the trial court held an evidentiary hearing on Petitioner's Motion to Suppress Based Upon Violations of the Georgia Constitution, the United States Constitution and O.C.G.A. § 17-5-30. The Petitioner requested that the trial court suppress evidence of a refusal in the trial of his case.

On September 6, 2001, the Court entered an Order Denying Petitioner's Motions and held that the implied consent warnings as read to the Petitioner in English at the time of his arrest adequately informed him of his rights under O.C.G.A. § 40-6-392(a)(3), and basing its decision primarily upon ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After a bench trial on September 24, 2001, wherein an interpreter was provided for Petitioner's benefit to translate the proceedings, the Petitioner was convicted for the offense of Driving Under the Influence of Alcohol, pursuant to O.C.G.A. § 40-6-391(a)(1), and the sentence imposed was as follows: The Defendant was sentenced to serve twenty-four (24) hours in custody with credit for time served, the balance of twelve (12) months on probation, forty (40) hours of community service, $700.00 fine plus surcharges and attend the Risk Reduction program (driving school).

Thereupon, a Notice of Appeal was filed on October 10, 2001. All State appellate procedures were exhausted and the Supreme Court of the State of Georgia affirmed Petitioner's conviction via an opinion issued on June 24, 2002. Although Petitioner has completed most of the conditions of his sentence, with the exception of the probation term provisions, Petitioner has standing to pursue this action on the grounds that not only has he suffered objective present harm, there is also the threat of specific future harm due to the potential for sweeping and improper applications of current Georgia law. ***U.S. Const.Amend XIV***. *See*, ***Bigelow v. Virginia***, 421 U.S. 809, 95 S.Ct. 2222 (1975); ***Gooding v. Wilson***, 405 U.S. 518, 92 S.Ct. 1103 (1972). *See also*, ***Campbell v. Louisiana***, 523 U.S. 392, 118 S.Ct. 1419 (1998); ***Adarand Constructors, Inc. v. Mineta*** 534 U.S. 103, 122 S.Ct. 511 (2001).

This Petition is properly and timely filed pursuant to U.S. Supreme Court Rule 13.

REASONS FOR GRANTING THE PETITION

I. The decision of the Supreme Court of Georgia is erroneous and is in direct conflict with the due process and equal protection clauses of the Constitution of the State of Georgia, as well as the Fifth and Fourteenth Amendments of the United States Constitution, in holding that non-English speaking individuals are not similarly situated to hearing-impaired individuals in their communication abilities and thus are not afforded a right to have the services of an interpreter to translate implied consent advisements in the same manner as that provided to hearing-impaired individuals.

This case is subject to strict scrutiny review. Following the enactment of ***O.C.G.A. § 24-9-103*** as applied to hearing-impaired persons, it is clear the Georgia legislature has endeavored to address the issue of assuring that one class of "impaired" citizens is afforded additional protections in receiving legal advisements. Current Georgia law, however, totally fails to provide protection to "language-impaired" citizens. The Georgia Court of Appeals in ***Tosar v. State***, 180 Ga.App. 885, 350 S.E.2d 811 (1986), ruled that NO EFFORT to obtain a translation of implied consent advisements was required of police officers who had arrested a citizen for driving under the influence (DUI). The implied consent law, as currently applied in Georgia, has a discriminatory impact and discriminatory intent based on race and national origin. While hearing-impaired citizens are afforded statutory protections greater than the ordinary citizen, language-impaired citizens are relegated to the same status as an unconscious person. This violates basic constitutional concepts. ***U.S. Const.Amend XIV, San Antonio Independent School Dist. v. Rodriguez***, 411 U.S. 1, 28, 93 S.Ct. 1278 (1973); ***Parks v. State***, 254 Ga. 403, 330 S.E.2d 686 (1985).

The Due Process clause of the U.S. Constitution requires that any deprivation of life, liberty or property be free from fundamental unfairness through governmental conduct that offends the community's sense of justice, decency and fair play. ***Moran v. Burbine***, 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-48 (1986).

Due process of law is a summarized constitutional guarantee of respect for those personal immunities that are rooted in the traditions and conscience of our people so as to be classified as "fundamental". ***Rochin v. California***, 342 U.S. 265, 169, 72 S.Ct. 205 (1952). Georgia's due process clause, ***Art. 1, Sec. 1, Par. I,*** mirrors the language of the due process clause of the Fifth and Fourteenth Amendments. Similar provisions of the Georgia Constitution have been said to afford *greater* due process protection than does the federal due process clause. ***Suber v. Bulloch County Bd. Of Ed.***, 722 F.Supp. 736 (S.D.Ga. 1989)(emphasis added).

In the instant matter, the State's failure to have read (or to have attempted to have read) the post-arrest implied consent notice to the Petitioner in his own language violated the Due Process and Equal Protection clauses as provided in the U.S. and Georgia Constitutions, because non-English speaking criminal defendants are similarly situated to hearing-impaired defendants and should have the same benefit of interpretation of the all-important implied consent advisements in a manner that is understandable and meaningful to them.

Georgia's statutes and case law in support thereof operate to the disadvantage of a suspect class and are not narrowly tailored to a compelling state interest. Therefore, the implied consent notice as provided in ***O.C.G.A. § 40-5-67.1***, ***O.C.G.A. § 40-6-392(a)(3)*** and the holding in ***Tosar v. State***, 180 Ga.App. 885, 350 S.E.2d 811 (1986), are constitutionally invalid, as applied to these facts.

In ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986), a non-English speaking defendant submitted to a

State administered breath test after having been read his implied consent warnings. The trial court granted the defendant's motion to suppress because the State did not meet the burden of showing that the defendant was informed of his implied consent rights. ***Id.*** The Court of Appeals reversed and concluded that a non-English speaking defendant *is the same as an unconscious per*son and that the inability of such an individual to communicate with the investigating officer results in the State-administered test being admissible under O.C.G.A. § 40-6-392(a)(3). ***Id*** (emphasis added). The inability to obtain an additional test should not preclude admission of the State-administered test. ***Id.*** The Court of Appeals also declined to compel the State to read or seek to obtain translation of the implied consent advisements in any language but English. ***Id.***

Of significance to the ***Tosar*** opinion is the total absence of any mention of a quick, readily-available means of obtaining a translation. If Language Line existed in the mid-1980s, no mention of it was made in ***Tosar***.

However, just recently in ***Padron v. State***, 254 Ga.App. 265, 562 S.E. 2d 244 (2002), the Georgia Court of Appeals reversed the conviction of two non-English speaking defendants because the state failed to establish that defendants understood the officer's request (at the roadway location of a traffic stop) to search the vehicle, and thus failed to establish that consent to search was freely and voluntarily given. The court took note of the fact that *despite the availability* of departmental consent to search waiver forms printed in Spanish, the deputy did not opt to use one. ***Id*** (emphasis added).

Only after arresting the defendants did the officer in ***Padron*** become concerned about their difficulty in understanding English, and he radioed ahead for an interpreter. ***Id.*** The ***Padron*** case evidences the fact that the Court recognizes that non-English speaking individuals can, in fact, communicate. This holding is in direct conflict with

its holding in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

Furthermore, the ***Padron v. State***, 254 Ga.App. 265, 562 S.E. 2d 244 (2002) case establishes that, by implication, if procedures and means exist for a police agency to translate advisements to non-English speaking individuals, via interpreters or written materials in an individual's primary language, then *there is a legal obligation to at least seek to utilize those resources*. Therefore, it is evident that in the instant matter the Georgia Supreme Court erroneously affirmed Petitioner's conviction on the basis of the ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986) decision, a case in which Language Line's instant availability was not an issue.

Pursuant to ***O.C.G.A. § 24-9-100***, "It is the policy of the State of Georgia to secure the rights of hearing-impaired persons who, because of impaired hearing, cannot readily understand or communicate in the spoken language and who cannot equally participate or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivision unless qualified interpreters are available to assist them." ***O.C.G.A. § 24-9-103(b)(1)*** also provides that a hearing-impaired person, upon being placed into custody, has a right to no interrogation, warning, information of rights, taking of statements, or other investigatory procedure to be undertaken until a qualified interpreter has been provided.

Furthermore, ***O.C.G.A. § 24-9-103*** is clear in its application to any hearing-impaired person taken into custody for allegedly violating any criminal law. ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001); ***State v. Woody***, 215 Ga.App. 448, 450, 449 S.E.2d 615 (1994). To be classified as "hearing-impaired" does not require a complete absence of hearing ability, but *only an impairment* that prohibits the person from understanding oral communications when

spoken in normal conversation tone. ***O.C.G.A. § 24-9-101(3)***; ***Yates*** at 37 (emphasis added). Additionally, the requirements in the statute are mandatory, and, if not met, the evidence acquired is not admissible under the statute. ***Id.***

Accordingly, ***O.C.G.A. § 24-9-103***, should apply to all defendants who cannot communicate or understand unless a qualified interpreter is available to assist, as they are similarly situated to hearing-impaired suspects. Pursuant to ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001), ***O.C.G.A. § 24-9-103*** is not concerned with the physical impairment of hearing ability, but an impairment that prohibits the person from understanding oral communications when spoken in normal conversation tone. ***O.C.G.A. § 24-9-103(3); Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001).

In issues of alleged alcohol impairment, one of the key issues is speed in obtaining a chemical test. For a hearing-impaired person, a telephone-based "translator" is of no use at the roadway. However, a language translation for a language-impaired person can be accomplished in a matter of minutes by way of Language Line, over any telephone.

The statute is not narrowly tailored to meet the State's interest as it creates a disadvantage to a class of citizens based on national origin who would otherwise come within the ambit of the statute based on their ability to communicate in the spoken language. This disparate treatment is not justified in light of the "Language Line" translation services being accessible immediately, via any telephone.

Here, the State's failure to provide an interpreter for the Petitioner violated the equal protection clauses of both the United States and the Georgia Constitutions, because non-English speaking criminal defendants are similarly situated to hearing-impaired defendants in that they cannot readily understand or communicate in the spoken language.[1]

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[1] Indeed, although the legislature in O.C.G.A. § 50-3-100(a) has adopted English as the official language of the State, it further provides:

The hearing-impaired statute operates to the disadvantage of a suspect class and is not narrowly tailored to a compelling state interest. Moreover, the enactment and institution of the "Language Line" service by Dekalb County places an implied legal obligation for police agencies to utilize these services. This legal conclusion is reinforced by the recent holding in ***Padron v. State***, 254 Ga.App. 265, 562 S.E. 2d 244 (2002). Therefore, non-English or language impaired defendants deserve the equal protection of the law as hearing-impaired defendants are afforded.

It is clear from the record in the instant matter that the Petitioner was clearly language impaired. It is also clear from the record that Petitioner could not understand enough English to be able to retrieve his wallet, much less perform field sobriety evaluations, due to his language impairment. Furthermore, at the time that Petitioner was arrested and read the implied consent notice, it was clear that the Petitioner could not have made a voluntary, intelligent and knowing decision on whether or not to take the state-administered chemical test, to refuse the state-administered chemical test or to request an additional, independent chemical test from qualified personnel of his own choosing, because there was no qualified person to translate the meaning of the notice for him in Spanish.

(b) This Code section shall *not be construed in any way to deny a person's rights under the Constitution of Georgia or the Constitution of the United States or any laws, statutes, or regulations of the United States or of the State of Georgia as a result of that person's inability to communicate in the official language.;*
(d) The provisions of subsection (a) of this Code section shall not apply: (1) When in conflict with federal law; (2) When ... *justice* require[s] the use of other languages...
[emphasis added]

The State had the Language Line service immediately available, and could have easily provided Petitioner with a qualified interpreter. The officer was fully aware of the availability of the service, yet made no effort to utilize it. The five-sentence implied consent notice could have easily been interpreted at minimal effort and cost. The Petitioner should have had the equal protection of the law, and the denial of such also violated his right to due process of the law.

II. The question presented is of extreme importance because to deny non-English speaking individuals the benefit of translating important fundamental rights that affect their liberty interests in a manner which can be readily comprehended is in direct violation of the due process and equal protection clauses of the United States Constitution.

A statute is tested under the standard of strict judicial scrutiny if it either operates to the disadvantage of a suspect class or interferes with the exercise of fundamental rights. ***U.S.Const.Amend. XIV***; ***GA Const. Art. 1, Sec. 1, Para. II*** (1983); ***Ambles v. State***, 259 Ga. 406, 383 S.E.2d 555 (1989). The term 'vested rights' means "interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice". ***Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources***, 266 Ga. 253, 466 S.E.2d 197 (1996). The Fifth Amendment to the United States Constitution guarantees to the States via the Fourteenth Amendment, that all individuals are entitled to due process before being deprived of the loss of liberty, as well as affording individuals the equal protection of the laws. Article 1, Section 1, Paragraph II of the Georgia Constitution (1983) also provides for the guarantee of equal protection of the laws.

The process of adequately being advised of legal rights that directly affect an individual's liberty interests are vested, constitutionally protected rights. Inherent in conferring such rights is the need for reasonable efforts to be undertaken to meaningfully communicate those rights. Under the constitutions of both the State of Georgia and of the United States, the process of initiating detention is clearly analogous to confrontation issues that occur later in the criminal prosecution of a case. Existing U.S. case law clearly establishes a right of non-English speaking criminal defendants during the course of various phases of judicial proceedings to be afforded the benefit of an interpreter. *See, e.g.*, ***United States v. Carrion***, 488 F.2d 12 (1st Cir. 1973), cert. den. 416 US. 907, 94 S.Ct. 1613; ***Escobar v. State***, 30 Ariz. 159, 245 P. 356 (1926); ***United States v. Bennett*** 848 F. 2d 1134 (11th Cir. 1988); ***Ton v. State***, 110 Nev. 970, 878 P.2d 986 (1994); ***Mariscal v. State***, 687 N.E.2d 378 (Ind. Ct. App. 1997) *reh'g denied*, (Jan. 14, 1998)(interpreter enables non-English speaking criminal defendant to understand trial; denial of interpreter of violates due process clause of Fourteenth Amendment).

While there is no express constitutional right to the appointment of an interpreter in a criminal case, in ***State v. Neave***, 117 Wis. 2d 359, 344 N.W.2d 181(1984), *overruled on other grounds by* ***State v. Koch***, 175 Wis.2d 684, 499 N.W.2d 152 (1993), the Wisconsin Supreme Court stated that principles of due process and fundamental fairness compel a conclusion that an accused who does not understand English sufficiently to confer with his attorney, or to reasonably comprehend testimony given in English at his preliminary hearing or trial, is entitled to the assistance of an interpreter at public expense, if necessary.

The Wisconsin court observed that unlike earlier European immigrants who were more readily assimilated and sought to use English as their primary or only language, many new arrivals and their families are culturally insulated and

proficient only in their native tongue. ***Id.*** The court explained that fairness requires that such persons who may be defendants in our criminal courts have the assistance of interpreters where needed, so as to remove the impression of having been dealt with unfairly. ***Id.***

Some jurisdictions take the position that a statute or constitutional provision, generally requiring the provision of an interpreter to a non-English speaking accused in criminal proceedings, does not mandate the appointment of an interpreter to assist the accused in matters or discussions of an extra-judicial nature taking place outside of court. *See, e.g.,* ***United States v. Medina***, No. 82-224/318, 1988 WL 59537 (D.N.J. May 24, 1988)[2](Federal Court Interpreters Act does not require appointment of interpreter to assist a non-English speaking accused during out-of-court discussions); ***People v. Gutierrez***, 177 Cal. App. 3d 92, 222 Cal Rptr 699 (5th Dist. 1986)(convicted criminal defendant was not entitled to an interpreter at a pre-sentence interview under a state constitutional provision guaranteeing an interpreter for non-English speaking accused "throughout the proceedings"; but court recognized that principles of due process entitle a non-English speaking criminal defendant to have some form of interpretation during pre-sentence interview with an English-speaking probation officer).

However, Petitioner contends that the investigative phase of a suspect who is about to be deprived of his or her liberty after being taken into custody is no less critical than the judicial phase and indeed is a point in time where a defendant's understanding and comprehension of his or her legal rights *is most critical*. Because Language Line services were readily available to the arresting officer via any telephone, access is all but immediate. Hence, delay is no longer an issue that the State can assert.

Therefore, this matter should be analyzed according to this Court's long standing emphasis on the importance of

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[2] Full text of case is set out in Appendix C for ease of reference.

criminal suspects to be able to understand and adequately communicate their understanding of basic fundamental rights afforded by the U.S. Constitution. *See*, ***Jackson v. Denno***, 378 U.S. 368, 84 S.Ct. 1774 (1964)(admissibility of a confession must be based on a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant); ***Carnley v. Cochran***, 369 U.S. 506, 82 S.Ct. 884 (1962)(waiver of Sixth Amendment right to counsel must be clearly evidenced by the fact that an accused was offered counsel but intelligently and understandingly rejected the offer).

In ***Boykin v. Alabama***, 395 U.S. 238, 89 S.Ct. 1709 (1969), in addressing the adequacy of the voluntariness of a guilty plea, this Court stated, "the same standard must be applied to determine whether a guilty plea is voluntarily made as that of determining effective waiver of right to counsel". ***Id.*** Thus, Petitioner contends that the same standard is applicable by analogy to these precedents as it pertains to non-English speaking individuals and their right to adequately understand and communicate their understanding of the implied consent law of Georgia, and should be applicable in the same manner afforded to hearing-impaired individuals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Lawrence Eric Taylor
Counsel of Record
3780 Kilroy Airport Way
Suite 310
Long Beach, CA 90806
(562) 989-4774

Norman H. Cuadra
Attorney for Petitioner
Norman H. Cuadra, P.C.
496 Medlock Road
Decatur, Georgia 30030
(404) 373-6315

William C. Head
Attorney for Petitioner
750 Hammond Drive, Bldg. 5
Atlanta, Georgia 30328
(404) 250-1113

APPENDIX A

In the Supreme Court
of Georgia

RODRIGUEZ
v.
STATE OF GEORGIA

565 S.E.2d 458 (2002).

June 24, 2002

SEARS, Presiding Justice.

The appellant, Omar Rodriguez, who speaks Spanish and not English, appeals from his conviction for driving under the influence of alcohol. He contends, first, that the results of his blood-alcohol tests should have been suppressed because O.C.G.A. § 24-9-103, which provides that police officers must attempt to obtain a qualified interpreter to inform a hearing impaired person of his implied consent warnings, violates equal protection since it does not provide that an officer must attempt to obtain an interpreter for people who do not speak English. Rodriguez also contends that O.C.G.A. § 40-5-67.1[1] and § 40-6-392(a)(3),[2] as interpreted

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[1] ***O.C.G.A. § 40-5-67.1(b)*** sets forth the implied consent notice that an officer must read to a person who has been arrested for driving in violation of ***O.C.G.A. § 40-6-391***. For drivers over the age of 21, the officer, among other things, must inform the driver that Georgia law requires him to submit to a state-administered test to determine if the driver is under the influence of alcohol or drugs; that if the driver refuses the testing, the refusal will result in a one-year suspension of his driver's license; that the refusal may be offered into evidence against the driver at a trial; and that

in ***Tosar v. State***[3] violate equal protection since non-English-speaking defendants, unlike English-speaking defendants, do not have their implied consent notice read to them in a language that they can understand. Finally, Rodriguez contends that due process requires that a driver be read his implied consent notice in his native language so that he is meaningfully advised of the rights and can exercise those rights in a meaningful fashion. For the reasons that follow, we conclude that these contentions are without merit, and we therefore affirm Rodriguez's conviction.

1. O.C.G.A. § 24-9-103 provides that when an officer takes a hearing impaired person into custody, the officer must request a qualified interpreter to assist the hearing impaired person, and that "[n]o interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken until a qualified interpreter has been provided."[4] If an interpreter is not available within one hour, the officer may then question and take a statement from the hearing impaired person.[5] This statute applies to hearing impaired persons arrested for driving under the influence and thus requires the officer to attempt to find an interpreter to convey the appropriate implied consent warning to the hearing impaired person through an interpreter.[6] As

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the driver is entitled to additional testing at his own expense from an expert of his own choice.

[2] ***O.C.G.A. § 40-6-392(a)(3)*** provides, in relevant part, as follows:

> The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer.

[3] 180 Ga.App. 885; 350 S.E.2d 811(1986).

[4] ***O.C.G.A. § 24-9-103(b)(1)***

[5] ***O.C.G.A. § 24-9-103(b)(2)***

[6] ***Allen v. State***, 218 Ga.App. 844, 463 S.E. 2d 522(1995).

Rodriquez correctly points out, the statute provides for no such accommodation for non-English-speaking persons arrested for DUI. We conclude, however, that the disparate treatment does not violate equal protection.

"The Georgia and U.S. Constitutions require government to treat similarly situated individuals in a similar manner."[7] The person who is asserting the equal protection claim has the burden to establish that " 'he is similarly situated to members of the class who are treated differently from him.' "[8] If the person asserting the violation cannot make the foregoing showing, "there is no need to continue with an equal protection analysis."[9]

In the present case, because hearing impaired persons physically cannot learn to understand an implied consent warning read to them in English, whereas non-English-speaking persons such as Rodriguez have no hearing disability and have the potential to understand such a warning, we conclude that Rodriguez is not similarly situated to a hearing impaired person.[10] Consequently, this equal protection claim is without merit.[11]

2. Rodriguez next contends that reading his implied consent rights to him in English and not in Spanish violated his right to equal protection, as an English-speaking defendant would have understood his rights whereas he did not. More specifically, Rodriguez contends that under O.C.G.A. § 40-5-

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[7] ***Old South Duck Tours v. Mayor & Alderman of City of Savannah***, 272 Ga. 869, 873, 535 S.E. 2d 751 (2000).
[8] ***Farley v. State***, 272 Ga. 432, 433, 531 S.E. 2d 100 (2000), quoting ***Reed v. State***, 264 Ga. 466, 467, 448 S.E. 2d 189(1994).
[9] ***Lowe v. State***, 267 Ga. 754(1), 482 S.E. 2d 344 (1997).
[10] *See* ***Sisson v. State***, 232 Ga.App. 61, 63, 499 S.E. 2d 422 (1998).
[11] *Accord* ***Furcal-Peguero v. State***, ___Ga.App.___, ___S.E. 2d___, 2002 WL 1013576, 2002 Ga.App. Lexis 655 (decided May 21, 2002).

67.1 and § 40-6-392(a)(3), as interpreted in ***Tosar v. State***,[12] a police officer is required to read a driver his implied consent rights only in English, that the statutes thus effectively classify drivers as English-speaking and non-English-speaking, and that the statutes treat non- English-speaking drivers differently than English-speaking drivers in that non- English-speaking drivers will not understand their implied consent rights.

In ***State v. Tosar***, Tosar, as Rodriguez, could only speak Spanish and was read his implied consent rights in English. On appeal, the Court of Appeals rejected his contention that his intoximeter test results were inadmissible since he had not been informed of his implied consent rights in his native language. In so ruling, the Court of Appeals concluded that the implied consent statute only required the officer to advise the defendant of his implied consent warnings and did not require the officer to make sure that the defendant understood those rights.[13] The Court of Appeals also declined Tosar's suggestion to require the State to print the implied consent warnings in Spanish or in as many the different languages as the Georgia driver's license examination is given.

Initially, we note that Rodriguez's contention that Tosar requires the implied consent rights be read only in English and thus creates a classification of English-speaking defendants and non-English-speaking defendants is problematic. First, the language of the relevant statutes[14] does not require that the implied consent rights be read only in English, and ***Tosar*** did not so hold. ***Tosar*** instead, simply held that the Court of Appeals would not require an officer to read the rights to the defendant in his native language. Thus, a police department could require its officers to read the

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[12] 180 Ga.App. 885, 350 S.E. 2d 811.

[13] ***Tosar***, 180 Ga.App. at 887-888, 350 S.E. 2d 811.

[14] ***O.C.G.A. § 40-5-67.1*** and ***O.C.G.A. § 40-6-392(a)(3)***.

rights in other languages or an individual officer could do so on his own. The statutes thus, on their face, do not create a classification. They only require that the implied consent rights be read to defendants. When a statute does not create a classification on its face, it only violates equal protection when the defendant can show the law was enacted or applied with a discriminatory purpose.[15] Here, Rodriguez has made no such showing.[16]

However, we also find no merit to Rodriguez's equal protection claim even if we assume that the relevant statutes require that the implied consent warnings be read only in English and thus can be said to create a classification on its face of English-speaking drivers and non-English-speaking drivers. As previously noted in this opinion, a person asserting an equal protection claim has the burden to establish that " 'he is similarly situated to members of the class who are treated differently from him.' "[17] Because we conclude that English-speaking drivers and non-English-speaking drivers are similarly situated for purposes of the implied consent laws, and because we conclude that the reading of implied consent notice only in English may unintentionally disadvantage non-English-speaking drivers in comparison to English-speaking drivers, we must decide whether this different treatment is constitutional. In doing so, we must

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[15] ***Stephens v. State***, 265 Ga. 356, 357-358, 456 S.E.2d 560 (1995); ***Personnel Administrator of Mass. v. Feeney***, 442 U.S. 256, 272-272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

[16] *See* ***People v. Wegielnik***, 152 Ill.2d 418, 178 Ill.Dec.693, 605 N.E. 2d 487, 491-492(1992)(Illinois implied consent law, which was construed by the Court not to require that defendants be given implied consent warnings in their native language, did not violate equal protection, as the law was neutral on its face and as defendant did not show that the law was enacted with or applied to him with an intent to discriminate against non-English speaking drivers).

[17] ***Farley***, 272 Ga. at 433, 531 S.E.2d 100, quoting ***Reed***, 264 Ga. at 467, 448 S.E.2d 189.

determine what level of scrutiny to apply to the different treatment. If the classification adversely impacts a suspect class or a fundamental right, we must test the classification under the standard of strict scrutiny.[18] If it does not, then the classification must be tested under the rational relationship test, which requires only that the classification bear a rational relationship to a legitimate state purpose.[19] Here, Rodriguez contends a suspect classification is involved because the implied consent laws discriminate on the basis of language and thus national origin. However, under equal protection analysis, a language classification by itself, particularly a broad English-speaking versus non- English-speaking one, generally is not equated with national origin or other suspect classification,[20] and we decline to so equate it in this case.

Testing the implied consent classification under the rational relationship standard, we readily conclude that the classification is constitutional. First, reading all drivers their implied consent rights in English will advise most people of their implied consent rights.[21] Second, requiring that officers advise drivers of the implied consent rights in their native language would impose severe administrative costs in that officers would have to be equipped to issue warnings in any and every language spoken by drivers in this State or would have to have access to an interpreter to issue the warnings. The logistics of such a requirement would be extremely problematic in a society as pluralistic and diverse as the United States. Third, the requirement urged by Rodriguez--

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[18] ***Kendrix v. Hollingsworth Concrete Products***, 274 Ga. 210, 553 S.E.2d 270 (2001); ***Barnett v. State***, 270 Ga. 472, 510 S.E.2d 527 (1999); ***Ambles v. State***, 259 Ga. 406, 407, 383 S.E.2d 555 (1989).

[19] ***Id.***

[20] *See* ***Soberal-Perez v. Heckler***, 717 F.2d 36, 41-43(2nd Cir. 1983); ***Commonwealth v. Olivo***, 369 Mass. 62, 337 N.E.2d 904, 910-911 (1975); ***Flores v. State***, 904 S.W.2d 129, 130 (Tex.Crim.App.1995). *See also* ***Pemberthy v. Beyer***, 19 F.3d 857, 870-872 (3rd Cir.1994).

[21] *See* ***Wegielnik***, 178 Ill.Dec.693, 605 N.E.2d at 490.

that an interpreter be made available to read a non-English speaking driver his rights--could lead to delay in obtaining the driver's blood-alcohol level, which dissipates over time, and thus would interfere with one of the purposes of the implied consent law.[22] In sum, these considerations are sufficient to provide a rational basis for requiring the implied consent warnings to be read only in English.

For the foregoing reasons, we conclude that this contention is without merit.[23]

3. Rodriguez next contends that due process requires that a driver be meaningfully advised of the implied consent rights so that he or she can exercise those rights in a meaningful fashion. Implied consent warnings, however, are a matter of legislative grace, and due process does not require that the warnings be given in a language that the driver understands.[24]

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[22] *See* ***O.C.G.A. § 40-5-55(a),*** which provides as follows:

The State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of Code Section 40-6-391 constitutes a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.... The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities.

[23] *Accord* ***Furcal-Peguero v. State,*** ___Ga.App.___, ___S.E.2d___, 2002 WL 1013576, 2002 Ga.App. Lexis 655 (decided May 21, 2002).

[24] *See* ***Wegielnik,*** 178 Ill.Dec. 693, 605 N.E.2d at 491 (due process does not require that an arresting officer warn a driver that the refusal to take a blood-alcohol test may be used against

Judgment affirmed.

All the Justices concur.

HUNSTEIN, Justice, concurring.

I concur in the majority's conclusion that police officers are not required by law to read the implied consent notice to drivers in a language other than English. In light of the growing international diversity of drivers in Georgia, however, I write specially to urge the Legislature to consider requiring law enforcement agencies to provide their officers with written foreign-language versions of the implied consent rights and, perhaps, a phonetic representation of those foreign-language versions, so officers can make a good faith

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him at trial, and as "due process does not require that [such] warnings be given at all, it does not require that they be given in a language the defendant understands"); ***South Dakota v. Neville***, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (admission at trial of driver's refusal to take blood-alcohol test did not violate due process even though driver not warned that refusal to take the test could be used as evidence against him, as right to refuse test was one of legislative grace and was not a right of constitutional dimension like the right to silence underlying *Miranda*). *See also* ***Allen v. State***, 254 Ga. 433, 434, 330 S.E.2d 588 (1985)("[i]n Georgia, the state may constitutionally take a blood sample from a defendant without his consent"); ***Lutz v. State***, 274 Ga. 71, 73, 548 S.E.2d 323(2001)(arresting officer not required by Fourth Amendment to warn driver that results of blood-alcohol test may be used in a criminal trial); ***Klink v. State***, 272 Ga. 605, 606, 533 S.E. 2d 92 (2000)("right to refuse to submit to state-administered testing is not a constitutional right, but one created by the legislature," and due process is not violated by arresting officer's failure to warn that results of blood-alcohol test may be used in a criminal trial).

attempt to inform non-English-speaking drivers of these important rights.

APPENDIX B

Fifth Amendment to the Constitution of The United States (in relevant part): "No person shall…be deprived of life, liberty, or property, without due process of law..."

Fourteenth Amendment to the Constitution of The United States (in relevant part): "No State shall make or enforce any law which shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws…"

28 U.S.C. § 1257(a): Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2403(b): In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the

extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Ga. Const., Art. 1, §1, Para. I: No person shall be deprived of life, liberty, or property except by due process of law.

Ga. Const., Art. 1, §1, Para. II: Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

O.C.G.A. § 24-9-100: It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivisions unless qualified interpreters are available to assist them.

O.C.G.A. § 24-9-101: As used in this article, the term:
(1) "Agency" means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of the state or any political subdivision thereof.
(2) "Department" means the Department of Human Resources.
(3) "Hearing impaired person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.
(4) "Intermediary interpreter" means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English

and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.
(5) "Proceeding" means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.
(6) "Qualified interpreter" means any person certified as an interpreter by the National Registry of Interpreters for the Deaf or approved as an interpreter by the Georgia Registry of Interpreters for the Deaf.

O.C.G.A. § 24-9-103: (a) The arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof.
(b) (1) Except as provided in paragraph (2) of this subsection, the law enforcement agency shall immediately request a qualified interpreter from the department, and the department shall provide a qualified interpreter. No interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken until a qualified interpreter has been provided; and no answer, statement, admission, or other evidence acquired from the hearing impaired person shall be admissible in any criminal or quasi-criminal proceeding unless such was knowingly and voluntarily given through and in the presence of a qualified interpreter. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.
(2) If a qualified interpreter is not available one hour after the hearing impaired person has been taken into custody and a request has been forwarded to the department, the arresting officer may interrogate or take a statement from such person, provided that such interrogation and answers thereto shall be

in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

Code of Georgia, Title 40, Chapter 5, Article 3:
40-5-67.1(b)(2) Implied consent notice for suspects age 21 or over:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.10 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Code of Georgia, Title 40, Chapter 6, Article 15:
40-6-391(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

...

(3) Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;…

Appendix C

U.S. v. Medina
1988 WL 59537
D.N.J.,1988.
May 24, 1988.

OPINION

CLARKSON S. FISHER, Senior District Judge.

Petitioner, Alvaro Bernal Medina, presently incarcerated at the United States Penitentiary at Lewisburg, Pennsylvania, brings this petition to vacate his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, this court will conduct an evidentiary hearing limited to a determination as to petitioner's ability to give a knowing and voluntary plea based on the representations of his attorney and his codefendant, who acted as an interpreter during plea discussions.

On July 21, 1982, a federal grand jury returned a four-count indictment against petitioner and his codefendant, Juan C. Rojas, for violations of 18 U.S.C. §§ 2113(a) and (d). Counts One and Two charged defendants in connection with the June 11, 1982, armed robbery of the United Jersey Bank in Hackensack, New Jersey, and Counts Three and Four charged defendants with the June 30, 1982, robbery of the National Community Bank in Lyndhurst, New Jersey.

Petitioner entered into a written plea agreement with the Government pursuant to which petitioner agreed to plead guilty to Count Three of the Indictment and to a two-count Information charging two additional robberies committed during June, 1982, in the Southern District of New York. The plea agreement was signed by the petitioner as well as by his attorney, Jacob R. Evseroff.

The guilty plea was entered before this court on

October 5, 1982. Petitioner was sentenced on November 22, 1982, to fifteen years' imprisonment for Count Three of the Indictment; five years for Count One of the Information, to run consecutively to the sentence for Count Three; and five years for Count Two of the Information, to run concurrently with the other sentences.

Petitioner has brought this petition seeking to vacate the sentence imposed upon him pursuant to his plea bargain and has based his claim on 28 U.S.C. § 2255, which provides a remedy in the nature of *habeas corpus* to prisoners in federal custody. Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). The statute states, in relevant part, that

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.§ 2255.

The asserted error of law must be a "fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. at 428; United States v. Callahan, 659 F.Supp. 80, 82 (E.D.Pa. 1987).

Petitioner asserts four grounds for relief from confinement. Petitioner first contends that his conviction was unlawfully obtained pursuant to a guilty plea which was made neither voluntarily nor with an understanding of the nature of the charge and the consequences of the plea. Petitioner next asserts that his conviction was obtained in violation of the rights and entitlements afforded criminal defendants. Third, petitioner contends that he was denied effective assistance of

counsel in connection with his conviction. Finally, he asserts that certain communications between petitioner and his attorney infringed on his right to a fair trial because during these discussions petitioner's codefendant acted as an interpreter.

As petitioner's four claims overlap, this court will focus on petitioner's primary claim, that of ineffective assistance of counsel, and its bearing on each of his additional claims. Specifically, petitioner asserts that counsel erroneously permitted his codefendant to act as an interpreter in out-of-court discussions and unlawfully induced petitioner to plead guilty by leading him to believe that the maximum sentence he could receive was fifteen years, as opposed to the twenty-year sentence imposed by this court.

The United States Supreme Court set forth the requisite standards for a showing of ineffective assistance of counsel in its 1984 decision *Strickland v. Washington,* 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). In order to prevail on such a claim, the petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the petitioner was prejudiced by his counsel's failures. 446 U.S. at 687-88. To sustain the burden of proving prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Id at 694. As set forth below, petitioner has failed to sustain his burden as set forth in *Strickland.*

Petitioner asserts that his attorney, Jacob R. Evseroff, improperly permitted petitioner's codefendant to act as an interpreter during plea negotiations. Petitioner contends that his inability to understand the English language during plea negotiations necessitated the appointment of an interpreter pursuant to 28 U.S.C. § 1827. Petitioner claims that use of his codefendant during negotiations was violative of the Act. I disagree.

The Act does not specify that interpreters are required

in such circumstances. In relevant part, the Act states that

> (a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of interpreters *in courts of the United States.*
>
> (b) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters *in courts of the United States* in bilingual proceedings....

28 U.S.C. 1827 (emphasis added).

As noted above, the statute requires that court-appointed interpreters be available to ensure that the defendant understands the proceedings that occur in court. United States v. Tapia, 631 F.2d 1207, 1209(5th Cir. 1980).

Petitioner admits that a court-appointed interpreter was provided by this court during in-court proceedings. Moreover, the petitioner expressed no dissatisfaction with the services performed by this interpreter. It is therefore undisputed that petitioner had the assistance of a court-appointed interpreter throughout the course of court proceedings and thus was not deprived of his rights under the Court Interpreters Act. The Act does not apply to discussions that take place outside of court.

In addition to his claim of violation of the Court Interpreters Act, petitioner asserts that the participation of his codefendant as an interpreter during plea negotiations infringed on petitioner's ability to make a knowing and voluntary plea. Petitioner asserts that his attorney failed to provide a neutral, unbiased interpreter, thus rendering his plea suspect. As petitioner's knowledge of the English language at the time of plea negotiations was severely limited, petitioner asserts that both his codefendant and his attorney led him to believe that his plea would result in a maximum sentence of fifteen years, rather than the twenty-year maximum imposed by this court.

Specifically, petitioner contends that his codefendant

misunderstood some of the information regarding the plea or, in the alternative, was motivated by a conflicting interest to protect himself at petitioner's expense. In addition, petitioner asserts that he was told by his codefendant, at the request of petitioner's counsel, to answer "yes" to all questions posed by this court during the plea hearing. Petitioner contends that he was directed to state that all court proceedings had been explained to him by counsel when, in fact, petitioner asserts that such explanations were never fully provided.

Pursuant to Rule 11(c)(1) of the Federal Rules of Criminal Procedure, the court must inform the defendant concerning, and determine that the defendant understands, the mandatory minimum penalty provided by law, if any, and the maximum penalty, if any, for the offense to which the plea is offered. The Advisory Committee Notes to the Rule state that the objective of the Rule is to insure that the defendant knows the minimum sentence the judge must impose and the maximum sentence the judge might impose. Before a plea of guilty may be accepted, the court must establish by questioning the defendant personally that he understands the nature of the charge and plea. United States v. Trott, 779 F.2d 912, 914 (3d Cir. 1985).

Petitioner asserts that the absence of the record of petitioner's Rule 11 hearing raises doubts as to the extent of questioning by this court. This court notes, however, that in rendering a decision on a motion to vacate sentence pursuant to 28 U.S.C. 2255, a judge's recollection of the events at issue may enable summary dismissal of the petition. Blackledge v. Allison, 431 U.S. 63, 74 n. 1, 97 S.Ct. 1621, 52 L.Ed. 136 (1977). The absence of a record of petitioner's hearing does not in and of itself require that an evidentiary hearing take place to determine whether petitioner's plea was, in fact, voluntary. A hearing is required, however, to determine the extent to which out-of-court procedures affected petitioner's ability to render a knowing and voluntary plea. Blackledge v. Allison, 431 U.S. at 72; Marchibroda v. United States, 368

U.S. 487. 494, 82 S.Ct. 510, 7 L.Ed. 473 (1962); United States v. Marzgliano, 588 F.2d 395, 398-99 (3d Cir. 1978).

In determining whether an evidentiary hearing was required in *Marchibroda,* the Supreme Court stated that

> The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

368 U.S. at 494. The Court went on to note that the factual allegations contained in the motion concerned purported occurrences outside the courtroom upon which the files and records could shed no light. *Id* at 494-95. In addition, the court noted that the circumstances alleged by petitioner could not be resolved completely by the district judge's ability to draw on his personal knowledge or recollection.Id at 495.

Petitioner in the instant case alleges that plea discussions during which his codefendant acted as interpreter resulted in petitioner's being led to believe that the plea agreement would subject him to a maximum sentence of fifteen years. These out-of-court discussions, including directions that petitioner answer that he in fact understood the nature of the charges and plea, cannot be evaluated by this court without an evidentiary hearing. The allegations as to matters outside the record, if true, cast serious doubt upon the voluntariness of the plea. United States v. Marzgliano, 558 F.2d at 399, *citing*, Moorehead v. United States, 456 F.2d 992, 995 (3d Cir. 1972). The fact that petitioner stated to this court that the plea was in fact voluntary does not preclude him from asserting at this time that his plea was not knowing and voluntary. Blackledge, 431 U.S. at 74-75. While a defendant may not ordinarily repudiate his statements to a sentencing judge, the implementation of a Rule 11 hearing is neither always perfect nor uniformly invulnerable to

subsequent challenge. Fontaine v. United States, 411 U.S. 213, 215, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973).

Accordingly, petitioner is entitled to an evidentiary hearing limited to a determination as to the effect such out-of-court discussions may have had on petitioner's ability to give a knowing and voluntary plea. Petitioner's remaining claims have been evaluated by this court and will not be addressed at this hearing. An order accompanies this opinion.